



CAP and BCAP regulatory statement: the use of “up to” speed claims in broadband advertising

The CAP and BCAP Review of telecommunications advertising has now concluded. Along with the issue of “up to” speed claims in broadband advertising, the Review also focused on the use of “unlimited” claims in telecommunications advertising.

CAP and BCAP are pleased to have received around 40 responses on both issues from a wide variety of stakeholders in industry, in the regulatory and not-for-profit sectors and from members of the public. CAP and BCAP are grateful to all who took part in the process and helped to shape the Help Notes.

Objective

CAP and BCAP’s objective was to produce guidance for the industry on how to interpret the Misleading Advertising sections of the Advertising Codes in relation to “up to” speed claims as they appear in both consumer and business-to-business advertising.

Background

The CAP and BCAP Review of “up to” speed claims followed concerns about potentially misleading claims services in advertisements for fixed line broadband services.

In summer 2010, CAP and BCAP conducted a pre-consultation with industry stakeholders and bodies representing the consumer interest. They also engaged the technical expertise of Ofcom as the statutory regulator of telecommunications services, including broadband services. The process culminated in a public consultation, which took place between 26 January and 25 February 2011.

CAP and BCAP members reconvened to evaluate all the points made by consultation respondents. Both committees were advised by the General Media Panel (GMP), an advisory group of advertising industry practitioners, and BCAP were advised by its Advertising Advisory Committee (AAC), a consumer representing body that advises on broadcast advertising issues.

In August 2011, CAP and BCAP submitted their draft Help Note to the ASA Council who agreed to have regard to it when considering complaints against advertisements for broadband services that feature “up to” speed claims.

Protecting consumers and guiding advertisers in a dynamic, evolving sector

The CAP and BCAP Help Note outlines approaches to the use of “up to” speed claims in broadband advertising that are likely to be compliant with the Codes i.e. the claims should not mislead the average consumer into making a transactional decision that he or she would not have otherwise taken. As speed claims are made in advertising on a wide range of media, the guidance takes the form of a combined Help Note for both broadcast and non-broadcast advertising.

The approach outlined in the guidance recommends a change in advertising practice to better reflect consumer expectations of broadband services that are advertised using “up to” speed claims. The fundamental principle operative in the Help Note is that maximum speed claims should be based on the actual experience of users and therefore marketers should be able to demonstrate that the speeds claimed in their advertising can be achieved by a reasonable proportion of the ISP’s customers.

The Help Note goes on to identify examples of factors that are likely to cause some customers to receive speeds significantly below the claimed maximum speed: CAP and BCAP consider that such factors are likely to constitute material information the omission of which might make an advertisement likely to mislead. If a significant proportion of an ISP’s customer base will receive a maximum speed that is so much lower than the advertised maximum that it prevents them from carrying out to an acceptable performance standard the types of online activity that they might reasonably expect to undertake on the service advertised, marketers must include further qualifying information to bear this information out.

Finally, the Help Note provides advertisers and practitioners with a clear guide to the substantiation the ASA is likely to require to justify a maximum speed claim. CAP and BCAP consider the guidance will allow consumers to make more informed choices about broadband services if download speeds are of particular interest to them.

The guidance comes fully into effect on 1 April 2012. Advertisers should produce any new campaigns in line with the guidance.

The Help Note and the law

The ASA’s interpretation of the Misleading Advertising sections of the Codes takes into account factors identified by the Consumer Protection from Unfair Trading Regulations 2008 (the CPRs) and The Business Protection from Misleading Marketing Regulations 2008 (BPRs).

Because the EU Directive from which the CPRs derive is a maximum harmonisation measure, CAP and BCAP cannot apply a greater or lesser restriction on advertising than is provided for in the CPRs. Specifically, they

cannot generally prohibit a marketing practice that is not listed in schedule 1 of the CPRs. Issues such as the use of the “unlimited” claims must be judged on a case-by-case basis.